

ORIGINAL

LAW OFFICES  
LEVENTHAL, SENTER & LERMAN

SUITE 600  
2000 K STREET, N.W.  
WASHINGTON, D.C. 20006-1809

NORMAN P. LEVENTHAL  
MEREDITH S. SENTER, JR.  
STEVEN ALMAN LERMAN  
RAUL R. RODRIGUEZ  
DENNIS P. CORBETT  
BRIAN M. MADDEN  
BARBARA K. GARDNER  
STEPHEN D. BARUCH  
SALLY A. BUCKMAN  
NANCY L. WOLF  
DAVID S. KEIR  
DEBORAH R. COLEMAN  
BERNARD A. SOLNIK  
NANCY A. ORY  
WALTER P. JACOB  
LINDA D. FELDMANN  
RENÉE L. ROLAND

TELEPHONE  
(202) 429-8910

TELECOPIER  
(202) 293-7783

March 15, 1996

SENIOR COMMUNICATIONS  
CONSULTANT  
MORTON L. HAMBURG

**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

**Re: MM Docket No. 95-176**  
**Closed Captioning and Video Description**

Dear Mr. Caton:

Transmitted herewith on behalf of the Motion Picture Association of America, Inc. are an original and nine copies of its Comments in response to the Commission's Notice of Inquiry in MM Docket No. 95-176 (FCC 95-484, released December 4, 1995).

Respectfully submitted,

*Barbara K. Gardner*

Barbara K. Gardner

BKG/kkj  
Enclosure

No. of Copies rec'd  
List ABCDE

29

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

RECEIVED  
MAR 15 1996  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Closed Captioning and Video Description ) MM Docket No. 95-176  
of Video Programming )

**COMMENTS OF**

**THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

Norman P. Leventhal  
Barbara K. Gardner  
John D. Poutasse

Leventhal, Senter & Lerman  
2000 K Street, N.W., Suite 600  
Washington, D.C. 20006  
(202) 429-8970

March 15, 1996

Its Attorneys

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY .....	ii
I. INTRODUCTION .....	2
II. CLOSED CAPTIONING .....	2
III. VIDEO DESCRIPTION .....	5
(A) Competing Uses For The SAP Channel .....	7
(B) Fewer Marketplace Incentives For Video Description .....	8
(C) Intellectual Property Issues .....	10
IV. PREVIOUSLY RELEASED PROGRAMMING .....	11
V. CONCLUSION .....	13

## SUMMARY

On a voluntary basis, the member companies of the Motion Picture Association of America, the major producers and distributors of motion pictures and television programs in the United States, have successfully risen to the important challenge of providing greater access to the television medium for persons with hearing and visual disabilities. Given the industry's proven commitment to achieving this goal, the FCC's implementation of the video programming accessibility provisions of the Telecommunications Act of 1996 needs to afford maximum discretion to program providers, and intrude minimally on the workings of the marketplace for video programming.

Today, nearly all widely distributed motion pictures produced and distributed by MPAA member companies are closed captioned for distribution over broadcast television, home video and cable television following their theatrical release. In addition, thousands of titles initially released earlier have also been captioned by the member companies. Currently, there are over 6,000 captioned titles.

MPAA member companies have been equally diligent with respect to captioning programming they produce for the major television networks: an estimated 75% of all broadcast network programming is currently closed captioned.

Just as the motion picture industry has responded to public demand and market forces by dramatically increasing the availability of closed captioning, it will respond positively as demand for video described programs increases. Indeed, after only a few years, the number of described titles licensed by MPAA member companies exceeds seventy.

Nonetheless, MPAA suggests that adopting mandatory video description rules would be inadvisable. To require that the Second Audio Program ("SAP") channel be dedicated

to video description would be to determine that that service advances a more important public interest goal than foreign language transmissions, a determination that should rest with the marketplace. In addition, the potential demand for video described programs is significantly smaller than that for either foreign language SAP transmissions or closed captioned programming. Finally, mandatory video description may conflict with copyright holders' exclusive rights to create derivative works from their copyrighted works.

With respect to library product, broad requirements mandating either the closed captioning or video description of all previously released programs are unnecessary in light of the motion picture industry's existing record of making popular preexisting programming available to those with disabilities. In addition, universal requirements would impose an undue burden on those responsible for providing the captioning or description, and would result in fewer and less varied programs being made available to the American public. The Telecommunications Act's directive that the Commission should "maximize the accessibility" of previously exhibited programming may well be implemented through such means as the FCC's serving either as a facilitator for voluntary industry activities on behalf of individuals with disabilities, or as a clearinghouse for technical and other information on captioning and video description.

In sum, past industry practice demonstrates that providing access to video programming for the deaf and hard of hearing as well as the blind and visually impaired has been a challenge that has been embraced by MPAA's member companies with enthusiasm and positive results. Where demand exists for the captioning or video description of previously released products, the motion picture industry will continue to meet that demand. For this reason, there is no need for the Commission to adopt either video description requirements, or overly rigid closed captioning rules that ignore the successful operation of the marketplace.

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

**RECEIVED**  
**MAR 15 1996**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Closed Captioning and Video Description	)	MM Docket No. 95-176
of Video Programming	)	

**COMMENTS OF  
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

The Motion Picture Association of America, Inc. ("MPAA"), pursuant to Sections 1.430 and 1.415 of the Commission's Rules, hereby comments on the Commission's Notice of Inquiry, FCC 95-484 (released December 4, 1995) ("NOI"), in the above-captioned proceeding. As is demonstrated below, without governmental requirements of any kind, the American motion picture, television and home video industries have responded overwhelmingly to the challenge of providing greater access to the television medium for people with hearing and visual disabilities. Accordingly, the Commission's implementation of the video programming accessibility provisions of the Telecommunications Act of 1996 needs to afford maximum discretion to program providers, and intrude minimally on the natural workings of the marketplace for video programming.

## **I. INTRODUCTION**

MPAA is the association representing major producers and distributors of theatrical films and entertainment programming for television, cable, home video and other delivery systems. Its members include the eight major producers and distributors of motion picture and television programs in the United States. As such, MPAA is uniquely positioned to address the broad voluntary efforts undertaken by the video production and distribution industry to promote greater accessibility to its product for those with disabilities.

## **II. CLOSED CAPTIONING**

Closed captioning, the visual display of the audio portion of a program, enables television viewers with hearing disabilities to enjoy the benefits of television. As the Commission has correctly noted, closed captioning also benefits individuals learning English as a second language and others who wish to improve their English literacy skills, including both children learning to read and illiterate adults.<sup>1</sup> It is estimated that there are more than 23 million Americans with hearing disabilities<sup>2</sup> and that nearly 100 million Americans would benefit from closed captioned television.<sup>3</sup> The motion picture industry agrees fully with the Commission's findings that closed

---

<sup>1</sup> NOI at ¶ 12.

<sup>2</sup> Id. at ¶ 1.

<sup>3</sup> National Captioning Institute, Inc., NCI FYI (March 12, 1993) at 1 (“NCI FYI”).

captioning offers significant benefits to a large segment of the American public and, in response, has undertaken substantial efforts to increase accessibility to closed captioned programming.

Ready access to closed captioned product is, or will be in the foreseeable future, available to nearly all Americans. Following the enactment of the Television Decoder Circuitry Act of 1990 ("TDCA"),<sup>4</sup> which requires that television sets with screen sizes of thirteen inches or larger that are manufactured in or imported into the U.S. on or after July 1, 1993 be capable of receiving and displaying closed captions,<sup>5</sup> it is estimated that every person in the U.S. will be capable of viewing closed captions by the year 2001.<sup>6</sup>

Both in response to the increased accessibility to closed captioned programming created by the TDCA, and in recognition of the substantial benefits that closed captioning provides to persons with hearing disabilities and others desiring to improve their English literacy skills, the motion picture industry has voluntarily undertaken substantial efforts to caption its product. Today, nearly all widely distributed motion pictures produced and distributed by MPAA member companies are closed captioned for distribution over broadcast television, home video and cable television following their theatrical release. In addition, thousands of titles initially released prior

---

<sup>4</sup> 47 U.S.C. §§ 303(u), 330(b).

<sup>5</sup> Id. See also 47 C.F.R. § 15.119.

<sup>6</sup> The Annenberg Washington Program, Closed Captioned Programming: Changing Developments In The Television Landscape--Rapporteur's Summary (October 17, 1991) at 8.



to this period have also been captioned. Currently, more than 6,000 closed captioned titles have been distributed.<sup>7</sup>

MPAA member companies have been equally diligent with respect to captioning programming they produce for the major television networks: an estimated 75% of all broadcast network programming is currently closed captioned. In fact, nearly 100% of both prime-time network programming and children's programming presently contains closed captions.

Moreover, captioning information is widely disseminated to the viewing public. To determine just what closed captioned programming is available, viewers need only open their local television programming guides, where more and more frequently, programs for which closed captions are available are clearly designated.<sup>8</sup>

In addition to its members' commitment to caption their programming for all non-theatrical delivery systems, MPAA has participated in the Motion Picture Access Project, which conducts research into new technologies that would permit persons with hearing disabilities to view feature films with closed captions in movie theaters. New technologies under review include

---

<sup>7</sup> Following first run release, a "submaster" of each motion picture is created; the submaster is closed captioned by the National Captioning Institute or another captioning service. All prints of the motion picture distributed for broadcast, cable television or home video exhibition are manufactured from the initial captioned submaster prepared for home video release, or from a subsequent submaster edited for broadcast television, and are therefore captioned themselves.

<sup>8</sup> For example, TV Guide listings include captioning information. Viewers may also consult Stuart Gopen's Guide to Closed Captioned Video (1993: Caption Database Inc.) which lists, by program category, over 5,000 titles that had been captioned as of 1993.

(1) captions visible only to viewers wearing special glasses; (2) adjustable plexiglass displays mounted on the seat-backs in front of patrons who wish to view captions projected from the rear of the theater; and (3) miniature television receivers in headsets displaying captions.

These voluntary efforts by the motion picture industry illustrate that marketplace forces have been enormously successful in increasing the availability of popular video programming to those with hearing disabilities. Consequently, there is no need for the Commission to impose an onerous regulatory regime to implement the new legislation.<sup>9</sup>

### **III. VIDEO DESCRIPTION**

Like closed captioning, video description is a means to improve the access of disabled persons to the television medium. MPAA agrees with the Commission that video description, which provides a narrative description of a program's key visual elements during natural pauses in the program's dialogue, has the potential to offer significant benefits to the more than 8 million visually impaired persons in the U.S.<sup>10</sup> While closed captioning is widely available to persons with hearing disabilities, video description, which is currently transmitted over the Second Audio Program ("SAP") channel, is a relatively new process, awareness of which is only now increasing.

As the Commission has noted, video description currently is available on a number of Public Broadcasting Service ("PBS") programs, as well as on PBS home videos.<sup>11</sup> In addition to

---

<sup>9</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 305, 110 Stat. 56.

<sup>10</sup> NOI at ¶¶ 1, 10, 11.

<sup>11</sup> Id. at ¶ 15.

its exhaustive listings of captioned product, Gopen's 1993 Guide to Closed Captioned Video lists more than thirty video described titles, including such popular motion pictures as The Hunt for Red October, Field of Dreams, and Raiders of the Lost Ark. Today, the number of described titles licensed by MPAA member companies has climbed to more than seventy. As the Commission also noted, the Narrated Television Network ("NTN"), which broadcasts nearly 20 hours of video described programs each week, is transmitted over more than 1,000 cable systems.<sup>12</sup>

Just as the motion picture industry has responded to public demand and marketplace forces to dramatically increase the availability of closed captioning, it can be expected that those same influences will result in more video description being made available for television, cable television and home video distribution. Toward this end, MPAA has met both with representatives of the visually impaired, and with its member companies to discuss with them the benefits associated with video description and to encourage them to license their product to the suppliers of these services. Currently, MPAA is facilitating face-to-face meetings between advocates for the visually impaired and some of its member companies. As noted, MPAA's members already have responded by licensing many motion pictures and television programs for video description, and MPAA expects it will continue to facilitate access to popular video programming by the visually impaired. For example, as reported recently in the Wall Street Journal, one member studio's retail home video subsidiary is currently test-marketing the rental of

---

<sup>12</sup>

Id.

described movie videos in ten cities, in conjunction with WGBH's Descriptive Video Service.

Until recently, such videos were not available in video stores.<sup>13</sup>

Nonetheless, video description presents a host of challenging issues not as prevalent in the closed captioning context that not only explains why fewer titles have been video described than captioned, but also suggests the inadvisability of the FCC's adopting mandatory video description rules. These issues include:

**(A) Competing Uses For The SAP Channel**

In addition to carrying video description, the Second Audio Program ("SAP") channel is increasingly used to transmit other useful services, such as foreign language translations of the main audio accompanying televised video programming. Such translations benefit those for whom English is a second language, recently estimated to be more than 30 million persons.<sup>14</sup> For example, this year for the first time in the event's history, a Spanish-language audio feed utilizing the SAP channel was made available with television coverage of the Super Bowl.<sup>15</sup>

---

<sup>13</sup> *Enhanced videos fill in background for visually impaired customers*, Wall Street Journal, Jan. 25, 1996, at 1. Several MPAA members are also assisting with Helen Harris' TheatreVision project, through which recorded narrations of the on-screen action of such motion pictures as Forrest Gump and Little Women bring the picture to life to visually impaired theater patrons wearing special headsets.

<sup>14</sup> NCI FYI at 1.

<sup>15</sup> Communications Daily, Jan. 23, 1996, at 9. NBC affiliates in 18 markets with significant Hispanic populations, including Los Angeles, Chicago, Miami, Dallas, Houston, San Diego and Washington, announced they would carry the feed. Spanish-language second audio programming feeds have previously been used for NBA finals and the NBA All-Star Game, as well as for Major League Baseball's

However, in today's analog world, an SAP channel cannot be simultaneously used for video description and foreign language transmissions. By mandating that the channel be dedicated to video description, the Commission would be determining that that service advances a more important public interest goal than foreign language transmissions, a determination best left to the marketplace. Clearly, it is more appropriate for the Commission to allow individual producers to decide the extent to which they wish to serve each of these important markets, than to foreclose one or the other. For example, some producers may want to respond to public demand for Spanish-language translations of certain programs that appeal to the Spanish-speaking community, and others may prefer to provide video descriptions for other programs.

**(B) Fewer Marketplace Incentives For Video Description**

The Commission also should recognize that the potential demand for video described programs is significantly smaller than that for either foreign language SAP transmissions or closed captioned programming. While there are approximately 8 million blind or visually impaired people in the U.S.,<sup>16</sup> as previously noted, there are some 23 million persons with hearing disabilities, and more than 100 million persons who can benefit from closed captioning.

Furthermore, of this smaller group who would benefit from video description, not all viewers possess the necessary equipment to receive video described transmissions. As the

---

All-Star Game. Id.

<sup>16</sup> NOI at ¶ 1.

Commission has pointed out, to receive video description in today's analog environment, the viewer must have a stereo television, a video cassette recorder ("VCR") capable of receiving the SAP channel, or a television adaptor for the SAP channel.<sup>17</sup> Regrettably, because manufacturers are not required to equip television sets to receive either stereo sound or the SAP channel, and broadcasters are not required to transmit in stereo, any regulations mandating video description will not immediately achieve the Commission's goal of assuring full access to such programming.<sup>18</sup> However, as household penetration of stereo television receivers increases over time, the marketplace can be expected to respond with increased product for the larger number of visually-impaired viewers capable of receiving video described programs.

Thus, while there are significant marketplace forces contributing toward the increased availability of closed captioning, other forces have tended to thwart the broader use of video description. However, because awareness of video description has recently become more widespread, there are now increasing demands that this service be provided for television programming, and the motion picture industry is responding just as it has in the context of closed captioning -- by increasing the availability of video described programs. Thus, mandatory video description requirements are unnecessary.

---

<sup>17</sup> Id. at ¶ 6.

<sup>18</sup> In 1986, only 4% of U.S. households contained a stereo-capable color television receiver. For 1996, it is estimated that number will reach 52%, according to the Electronic Industries Association ("Color TVs with Stereo," Jan. 1996).

**(C) Intellectual Property Issues**

The narrative provided by video description requires a creative effort by the person generating the service which may be subject to federal copyright laws. Characterized by The Metropolitan Washington Ear, Inc. as “the art of talking pictorially,”<sup>19</sup> video description must recreate a copyrighted movie or program’s action, set and costumes, scene changes, body language, facial expressions, and graphics so that a visually impaired individual can appreciate the entire work. By virtue of its creative nature, video description may be a “derivative work” under copyright law.

As defined in Nimmer On Copyright, “[a] derivative work consists of a contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work. This would include a new version of a work in the public domain, and abridgment, adaptation, arrangement, dramatization, or translation.”<sup>20</sup> If, as it would appear, video description is subject to the copyright laws as a derivative work, the unauthorized video description of the underlying work would constitute copyright infringement.<sup>21</sup> As a consequence, absent a statutory change

---

<sup>19</sup> Release by The Metropolitan Washington Ear, Inc., dated November, 1994

<sup>20</sup> David Nimmer, Nimmer On Copyright, § 3.03 (1995) (footnotes omitted) (“Nimmer On Copyright”).

<sup>21</sup> See Nimmer On Copyright, § 3.06. In addition, copyright owners of motion pictures have the exclusive right “to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). In the case of a motion picture, the term “perform” means “to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101. Whether video description may constitute a public performance is another issue that would

creating some form of compulsory license for video description, any mandatory video description regulations may conflict with copyright holders' exclusive rights to create derivative works from their copyrighted works..

In the face of these uncertainties and considerations, it is wholly premature for the Commission to establish any rules concerning video description.

#### **IV. PREVIOUSLY RELEASED PROGRAMMING**

There is no justification for broad requirements mandating either the closed captioning or video description of all previously released programs. As is now shown, such requirements are unnecessary in light of the motion picture industry's existing record of making preexisting popular programming available to those with disabilities. In addition, universal requirements would impose an undue burden on the entity or entities responsible for providing the captioning or description, and would result in fewer and less varied programs being made available to the American public. To the greatest possible extent, the Commission should instead rely on market forces to stimulate the captioning or video description of library product at the rate at which the American public -- through their own choices -- deems captioned or described product to be necessary or desirable.

Mandatory captioning or mandatory video description of previously released programming is unnecessary (particularly with regard to closed captioning) because much of the existing library

---

have to be examined prior to the adoption of any mandatory rule.



has already been captioned. See Gopen's Guide to Closed Captioned Video, *supra*. In addition, MPAA's member companies constantly caption previously uncaptioned catalog titles as they are re-released. For example, one member company has closed captioned more than fifty percent of all titles it has released in the United States. As market demand for video described versions of library product increases, that demand will also be met.

Moreover, compliance with any such retroactive requirements would be impractical and expensive in terms of captioning or describing entire libraries that may contain thousands of titles. For example, if the cost of closed captioning a two-hour theatrical release were \$1,600 per movie (a reasonable estimate given available cost information),<sup>22</sup> the total cost to caption the approximately 24,000 uncaptioned movies would be \$38.4 million. At approximately \$6,000 per two-hour movie, the cost to video describe the same library would be approximately \$144 million. Given the need to pass through these costs, it is clear that broadcasters and other video programming providers would simply not purchase these older captioned or described programs, resulting in reduced diversity of programming products available to the public.

Forebearing from enacting requirements that all library product be closed captioned or video described also is consistent with the telecommunications legislation just enacted by Congress. For video description, the FCC is not directed to promulgate any rules at all. In the closed captioning context, the legislation provides that the Commission should simply "maximize the accessibility" of previously exhibited programming -- a directive that may well be implemented

---

<sup>22</sup>

NCI FYI at 2.

through such means as the Commission's serving either as a facilitator for voluntary industry activities on behalf of individuals with disabilities, or as a clearinghouse for technical and other information on captioning and video description.

In sum, requiring the wholesale closed captioning or video description of previously released programming irrespective of demand for such product is unnecessary and impractical. Furthermore, past industry practice demonstrates that providing access to video programming for the deaf and hard of hearing as well as the blind and visually impaired has been a challenge that has been embraced by MPAA's member companies with enthusiasm and positive results. Where demand exists for the captioning or video description of previously released products, the motion picture industry will continue to meet that demand.

## V. CONCLUSION


MPAA fully supports the Commission's determination that closed captioning and video description serve the public interest by offering persons with hearing and visual disabilities the ability to enjoy and benefit from the dynamic television medium. Indeed, as these comments reveal, the motion picture industry has responded to the public's desire for closed captioned programming by dramatically increasing its availability, and expects to provide more video described programming as demand for that service increases. For this reason, there is no need for the Commission to adopt either video description requirements, or inflexible closed captioning requirements that ignore the successful operation of the marketplace.

Moreover, mandating closed captioning or described video versions of all previously exhibited programming will disserve the public interest by imposing an unjustified and undue

burden on the entities responsible for providing those services, and by diminishing the breadth of programming available to all audiences.

Respectfully submitted,

THE MOTION PICTURE ASSOCIATION  
OF AMERICA, INC.

By:   
Norman P. Leventhal  
Barbara K. Gardner  
John D. Poutasse

Leventhal, Senter & Lerman  
2000 K Street, N.W., Suite 600  
Washington, D.C. 20006  
(202) 429-8970

March 15, 1996

Its Attorneys